

OFCOM response to European Commission consultation on the independence of audiovisual regulatory bodies

Below we set out the following:

- A. what Ofcom considers to be the principles of effective regulation which relate specifically to independent governance, accountability and funding; together with some examples of how Ofcom implements these principles;
- B. a summary of other principles of effective independent regulation, which relate to the operational independence and capability of the regulatory body; and specific examples of how Ofcom demonstrates independence in carrying out our duties concerning audiovisual content; and
- C. we also offer some reflections on the value of cooperation between European audiovisual regulators.

A. Principles of effective regulation that relate to independence

- i. **Independent governance and decision making**, ensuring that decisions are taken free from industry or political interference, consistent with principles of good corporate governance. Governance arrangements would need to ensure that there is no inappropriate influence over decision making by third parties and that the governing body is independent, responsible and publicly accountable for the effective functioning of the regulator.

Legislation underpinning Ofcom's independent decision making

Under the European regulatory framework for electronic communications, Member States are required to guarantee the independence of the national regulatory authority with competence over ex ante market regulation and dispute resolution (Article 3, Framework Directive¹) and Ofcom is the national regulatory authority for these purposes. The independence provisions in the Framework Directive require Member States to ensure that national regulatory authorities (NRAs) act independently and do not seek or take instructions from any other body in relation to the exercise of certain key regulatory tasks assigned to them. Only appeal bodies may suspend or overturn decisions by national regulatory authorities, and the head of a national regulatory authority and other members of the collegiate body fulfilling that function may be dismissed only if they no longer fulfil the conditions required for the performance of their duties laid down in advance in national law.

Ofcom's statutory duties and established powers are set out in the Office of Communications Act 2001 and the Communications Act 2003, but the independence of the UK's electronic communications regulator dates back to the Telecommunications Act 1984. UK law ensures that we perform our day-to-day duties and decision making independently from the Government. In addition, our established powers mean that there is no scope for

¹ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009.

inappropriate influence in our decision making by the bodies we regulate (also a requirement under the electronic communications framework).

The Ofcom Board and the Ofcom Chairman

The Ofcom Board is comprised of up to nine members, plus the non-executive Chairman. Six of the Board's members are part-time members, appointed by the Secretary of State for Culture, Media and Sport; up to three members are full-time Executive members, including the Chief Executive. The Chairman and other non-executive members of the Board appoint the Chief Executive, subject to the approval of the Secretary of State, and also appoint any other executive Board members. The composition of Ofcom's Board is determined in accordance with the Office of Communications Act 2002 and is published. Ofcom must have a majority non-executive Board. While the Board and its delegated boards and committees are comprised of those with relevant expertise, they do not include anyone who is actively engaged in the regulated industry.

While the Chairman and non-executive members of the Ofcom Board are appointed by the Secretary of State, there are safeguards in place to ensure their independence and consequently the independence of Ofcom as an organisation. For example, Ofcom's Chairman is appointed for a fixed term of five years. The appointment process for the Chairman involves an open competition and is subject to a confirmation hearing by Parliament, conducted by the relevant House of Commons Select Committee. The removal of the Chairman or any other member of the Ofcom Board is subject to the protections afforded by European law, in particular Article 3(3a) of the Framework Directive.²

The Board is Ofcom's main decision-making authority and ultimately takes responsibility for all actions of the organisation. The Ofcom Executive is responsible for Ofcom's day-to-day running and is answerable to the Board.

- ii. **Clear public accountability**, to ensure that the regulator is held to account in delivering against its public purposes. This could be delivered by independent oversight of the regulator's activity on a periodic basis, to ensure that the governance, operation, processes and decisions of the regulator are regularly scrutinised and that the results of this scrutiny are transparent.

Accountability through the UK Parliament

Ofcom is accountable to Parliament and reports annually by laying an annual report and its accounts before Parliament.

Ofcom appears before Parliamentary Committees from time-to-time, both in Westminster and in the devolved Parliaments/Assemblies in Scotland, Wales and Northern Ireland. Some of these attendances are ad hoc, others are more fixed. For example, there is an annual appearance by the Ofcom Chair and CEO before the Culture, Media and Sport Committee. These sessions are intended to scrutinise Ofcom's annual plan over the past financial year. Ofcom also attends subject inquiries where we will give written and oral evidence to the

² Under Article 3(3a), NRA heads can only be dismissed for objective reasons. Any dismissal must be made public, and the reasons can be required to be published.

inquiry and will respond to the committee's recommendations (though committees do not have the power to instruct Ofcom).

Ofcom also advises on Parliamentary Questions from Departments and responds to letters and questions it receives directly from Parliamentarians.

Any evidence and recommendations provided to Ministers and Parliament are made public, transparent and contestable. Ofcom meets regularly with Ministers to explain its work and meets routinely with officials from the Department of Culture, Media and Sport (DCMS) and Business, Innovation and Skills (BIS) on a wide range of issues.

Ofcom is audited by the National Audit Office (NAO), which body approves Ofcom's annual accounts. The role of the NAO is to scrutinise public spending on behalf of Parliament. It reports the results of its audits to Parliament, and holds government departments and bodies to account for the way they use public money, thereby safeguarding the interests of taxpayers. The Comptroller and Auditor General and the NAO staff are independent of government and they do not report to any Minister.³

- iii. **Independent funding and budget control**, to ensure the regulator can deliver its public purposes with sufficient resources and without fear of interference from industry or government. Typically this should mean budgets are agreed for a significant period, such as four years. During this period the regulator should be required to manage within the set budget limits (excluding exceptional events), but it should also have security in relation to this funding and not be subject to financial pressure that would undermine its ability to act independently.

Ofcom's funding model

Ofcom is funded by a combination of fees from industry for regulating broadcasting and communications networks, and grant-in-aid from the Government. Grant-in-aid from the Government covers Ofcom's functions in relation to managing the radio spectrum and to those functions Ofcom must carry out, but for which legislation has provided no matching revenue stream. For example, the statutory public interest test for media mergers and Competition Act investigations are funded through this mechanism.

The administrative costs for carrying out functions in relation to broadcasting are funded by broadcast licensees and do not come from grant-in-aid from the Government. The basis on which we collect our administrative costs for these functions is set out in our Statement of Charging Principles.⁴

B. Summary of other principles of which relate to the operational independence of a regulatory body

- i. **Clear regulatory objectives set out in a Code** which allows industry and the public to see the nature and scope of the regulation. This allows the regulator to set out the rules against which it would operate, to provide focus to its activities and to ensure that regulated parties understand clearly the standards they must meet, allowing them to develop their compliance programmes accordingly.

³ <http://www.nao.org.uk/about-us/>

⁴ http://stakeholders.ofcom.org.uk/binaries/consultations/socp/statement/charging_principles.pdf

- ii. **Clear and transparent processes**, to ensure that it is clear how regulatory investigations are conducted and that relevant parties can appropriately engage with those processes. Typically this would mean consulting on and publishing processes for complainants, processes for submissions by regulated parties, rights of third parties and rights of appeal. These processes need to find an appropriate balance between timeliness and principles of natural justice.
- iii. **Accessibility**, to ensure that individual financial circumstances are not a pre-requisite to securing redress, essentially requiring the system of regulation to be free at the point of use. This would mean setting up appropriate complaints handling mechanisms (e.g. phone, email and website) and securing a funding model to ensure that complaints are logged and investigated at no cost to the complainant.
- iv. **Genuine powers of investigation**, to ensure that regulated parties cannot prevent effective investigation where wrongdoing is alleged. These are typically powers to seek and access information, powers to undertake own initiative investigations (i.e. without a complaint) and powers to impose meaningful penalties for failure to cooperate.
- v. **Effective powers of enforcement and sanction**, ensuring that regulatory action is a genuine deterrent both to the party being punished and as a warning to other regulated parties. These would give the regulator the power to levy proportionate sanctions on regulated parties to punish breaches of rules and to act as a deterrent to other parties in relation to future behaviour.

Given the focus of this consultation on the independence of audiovisual regulatory bodies in particular, we have set out below specific examples of how Ofcom demonstrates independence in performing our duties to ensure the application and enforcement of standards for television and radio.

Applying and enforcing standards for television and radio

Ofcom maintains and enforces the Broadcasting Code (“the Code”), which sets out the rules by which all UK-licensed broadcasters must abide.⁵ The Code, and any revisions, are drafted by the Ofcom Executive and are subject to public consultation, which allows for transparency and public scrutiny. The Code must be approved by the Ofcom Content Board, which is established in statute and has delegated and advisory responsibility for a wide range of content issues, predominantly dealing with broadcasting.⁶ The Content Board has ten members, four of whom represent each of the countries in the UK. It includes both lay members and members with extensive broadcasting experience, but it does not include members who are actively working in the broadcasting industry. The Ofcom Board both appoints and has the power to remove members of the Content Board.

⁵ Parliament has given Ofcom statutory duties in relation to the content of television and radio services in the Communications Act 2003. Specifically, we have a duty to set standards for the content of programmes to be included in television and radio services to best secure the standards objectives set by Parliament. These standards have to be published in a code.

⁶ See Section 12(1) of the Communications Act 2003

Ofcom, as a public body, is bound by the Human Rights Act 1998 which makes it unlawful for a public body to act in a way which is incompatible with a convention right under European Convention on Human Rights. Further, section 3(4)(g) of the Communications Act 2003 explicitly states that Ofcom, in performing its duties in relation to the application of standards, must have regard to "the need to secure the application in the case of television and radio services ... of standards... in the manner that best guarantees an appropriate level of freedom of expression." Ofcom's Broadcasting Code takes account of the right to freedom of expression, as expressed in Article 10 of the Convention (which includes the right to hold opinions and to receive and impart, information and ideas without interference by public authority) and Article 8 (which is that everybody has the right to respect for their private and family life, home and correspondence).

Independent broadcast regulation ensures that standards for broadcast content are applied in the interests of citizens and consumers. As well as being subject to a wide ranging public consultation, the Code was informed by audience research on public attitudes. When Ofcom investigates broadcast content under the rules in the Code, it does so independently and without external influence. For example, the Code rules on impartiality are designed to ensure that consumers receive duly accurate news coverage, and duly impartial news and non-news programming dealing with matters of political and industrial controversy and matters relating to current public policy. The Code does not prohibit broadcasters from discussing any controversial subject or including any particular point of view in a programme.

Furthermore, the Code allows broadcasters to criticise any Government, political party or organisation, as long as due impartiality is maintained (i.e. alternative viewpoints are expressed in programming) and, in the case of news content, due accuracy is maintained. In considering such issues the term "due" is important and means adequate or appropriate to the subject and nature of the programme, in particular, the seriousness or extensiveness of any criticism made. As the Code makes clear, "due impartiality" does not mean an equal division of time has to be given to every view, or that every argument and every facet of every argument has to be represented. Due impartiality may be preserved in a number of ways depending on the specifics of the issue, and it is an editorial decision for the broadcaster as to how it ensures due impartiality is maintained.

C. Observations on cooperation between European audiovisual regulatory bodies

The Commission's consultation also seeks views on the utility of cooperation between EU audiovisual regulators across a range of issues. The consultation identifies a number of possible arrangements for such cooperation, including a voluntary gathering of competent regulatory bodies, a legally mandated one and an agency created specifically for this purpose (in each case, at EU, pan-EU or global levels).

Ofcom believes that there is great value in cooperation between regulatory authorities. Given our common responsibilities under the AVMS Directive (as well as the scope for cross-border content provision and the operation of the country of origin principle), cooperation between EU audiovisual regulators is particularly important. We value the opportunity to exchange our experiences and regulatory approaches (enabling us to learn from each other, and potentially contributing to the gradual alignment of our respective approaches), and the community of fellow authorities with whom we can have frank and open discussions.

- **EU cooperation** - Ofcom is a member of the Audiovisual Regulators Group (ARG), which we value for the opportunity that it gives for all EU NRAs to share (together

with the Commission) different approaches, and to seek guidance on the interpretation and implementation of the AVMS Directive.

- **Pan-EU cooperation** - As the Commission will of course be aware, a voluntary gathering of NRAs already exists in Europe – the European Platform for Regulatory Authorities (EPRA) – and it is one in which Ofcom is an active member (including holding a vice-chair position on the EPRA Board). EPRA provides a network of information sharing and support for its members, allows open and frank discussion and creates valuable comparative studies of different approaches to regulation across not only the EU but all of its 53 pan-European members. It does not take common positions or require a harmonised approach among members, recognising the cultural differences that play such a large part in domestic audiovisual regulatory policies. But precisely for this reason, it serves a valuable purpose in helping to educate its members about these cultural differences between them.

We consider that these existing mechanisms for cooperation provide a number of tangible and intangible benefits, as described above. In considering whether these cooperative mechanisms are sufficient or whether benefit might be derived from formalising or complementing them, one would first need to identify their intended purposes. The decision as to whether existing cooperation mechanisms need to be formalised, and indeed the nature and form of such cooperation, should depend on the objective – and not the other way around.

1. Ofcom believes the existing mechanisms are sufficient **for the exchange of information and experiences and the promotion of mutual understanding**.
2. If the purpose were **to enable the formal adoption of common regulatory positions/best practices** (particularly if they were intended to carry some legal weight), then some formalisation of the ARG could be warranted. Given that all European audiovisual regulatory bodies operate within the framework of the Audiovisual Media Services Directive, this would be the obvious first place to look for whether more formalised cooperation mechanisms might provide added value. **However**, given the nature of the AVMS framework (a minimum harmonisation framework, rather than a maximum harmonisation framework such as the one in electronic communications), and the central balance it strikes between the promotion of the single market and the need to respect legitimate cultural differences across Member States, it is not clear that there is real scope (or, indeed, demand) for harmonised rules (beyond the minimum standards already negotiated as part of the AVMS itself), nor that the elaboration of such rules is necessarily within the power of national audiovisual regulators in the first place (as opposed to their respective governments).
3. Another potential purpose might be **to enable the Commission to seek the expert advice of a body of EU regulators**, in developing its own policies in the audiovisual field. One might argue that in this respect the ARG represents an underused resource. In the electronic communications sector, the Commission decided (in 2002) to take advantage of the informal network of EU regulators, the Independent Regulators' Group (IRG), and by Decision 2002/627/EC(1) created the European Regulators' Group (ERG) to provide it with advice and assistance in the promotion of the single market. The creation of the ERG was nothing more than the formalisation of the Commission's existing ability to seek the inputs of NRAs (collectively), but it

was the first step in the gradual integration of Europe's national regulators into the operation of the European regulatory framework.⁷

On the basis of these observations, Ofcom believes this is an area that merits further consideration in the context of the eventual review of the AVMS Directive and any role in that framework that there might be for audiovisual regulators acting collectively.

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⁷ BEREC is the successor of the ERG (identical membership) and represents the evolution of the advisory role of EU NRAs vis a vis both the European Commission (e.g. through opinions on Commission harmonisation initiatives, of which the Commission must take the utmost account) and each other (e.g. through BEREC common positions, of which NRAs must take the utmost account). BEREC is established by Regulation (an "upgrade" from the Commission's ERG Decision) and, unlike its predecessor, has a formal statutory function in the regulatory framework.